Syarikat Chang Cheng (M) Sdn Bhd v Pembangunan Orkid Desa Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S6–22–898–89
KC VOHRAH J
20 NOVEMBER 1995

Contract *— Building contract — Delay — Sale of shop house by developer — Vacant possession should be delivered within 18 months from date of agreement under r 12(1)(o) of Housing Developers (Control and Licensing) Rules 1970 — Sale and purchase agreement provided for 24 months — Deviation from statute — Whether term in agreement valid — Housing Developers (Control and Licensing) Rules 1970 r 12(1)(r)*

Contract *— Building contract — Delay — Sale of shop house by developer — Project abandoned — Vacant possession not delivered — Whether cause of action accrued — Whether purchaser entitled to damages — Housing Developers (Control and Licensing) Act 1966 & Housing Developers (Control and Licensing) Rules 1970 r 12(1)(r)*

By an agreement dated 9 September 1981, the defendant agreed to sell to the plaintiff a shop house. Clause 17 of the agreement provided for the delivery of vacant possession of the shop house within 24 months from the date of the agreement, failing which agreed damages would be payable 'from such aforesaid date [ie the date of the agreement] to the date of actual completion and delivery of possession of the said building to the purchaser'. This deviated materially from r 12(1)(o) of the Housing Developers (Control and Licensing) Rules 1970 ('the Rules') which provides for delivery not later than 18 months from the date of the signing of the contract of sale. Rule 12(1)(r) provides for the payment of indemnity for any delay in the delivery to be calculated from day to day 'commencing immediately after the date of delivery of vacant possession as specified in the contract of sale'. Work on the project had stopped on 7 May 1982 on the local authority's direction. On 1 March 1983, the defendant was allowed to resume work but the construction site was found to contain hard granite which made it impossible to build blocks thereon. The defendant alleged that the performance of the agreement was rendered impossible and thus it failed to deliver within the stipulated time. The plaintiff sought 'liquidated damages' pursuant to cl 17 of the agreement. The Senior Assistant Registrar dismissed the plaintiff's application under O 14 of the Rules of the High Court 1980 and the plaintiff appealed to the High Court. The defendant's contention was that, although vacant possession had not been delivered after 15 years, the plaintiff's cause of action was premature in view of the Privy Council case of *Loh Wai Lian v SEA Housing Corp Sdn Bhd* [1987] 2 MLJ 1. Thus, the issue was whether the plaintiff's cause of action had accrued.

Held, dismissing the appeal with costs:

(1) The agreement was governed by the Housing Developers (Control and Licensing) Act 1966 ('the Act') and the Rules. Terms and conditions which purport to get round the Act and Rules so as to remove the protection of home buyers may not be inserted. Thus, it seemed clear that the provision for delivery of vacant possession within 24 months was void (see pp 803C and 804B–D).

(2) The contract should be construed in the light of the statutory provisions to which it was designed to give effect. Rule 12(1)(r) of the Rules imposed on the developer the obligation to indemnify the purchaser for any delay in delivery of possession, and provided a formula by which the amount of indemnity was to be calculated. The calculation of the amount of the indemnity is based on a day-to-day calculation of a rate of interest starting from the contractual completion date (see p 804F).

(3) However, r 12(1)(r) could not be construed as debarring damages for delay as a result of a clearly ascertainable inability to deliver a house (see p 806C).

(4) If there is a clearly ascertainable inability by the defendant to deliver the property by a certain time, and that such a date had been ascertained and therefore the damages could be calculated, the plaintiff is entitled to the damages (see pp 805F and 806F).

(5) In the instant case, the construction of the shop house was abandoned and accordingly, the date of the defendant's inability to perform could be ascertained. It was then necessary to ascertain the date from which compensation should be paid. For that purpose, 18 months from the date of the agreement would give 9 March 1983 as the starting point. However, work was ordered to stop on 7 May 1982 and was allowed to resume on 1 March 1983. It was arguable whether the starting period of 18 months provided for by r 12(1)(o) to the defendant to deliver vacant possession had to be adjusted to take into account the period of the stoppage of work on the direction of the local authority. That question could not be answered and the appeal would accordingly be dismissed (see p 807D–G).

[Bahasa Malaysia summary

Melalui suatu perjanjian bertarikh 9 September 1981, defendan telah bersetuju menjual sebuah rumah kedai kepada plaintif. Fasal 17 perjanjian itu memperuntukkan hantar-serah milikan kosong rumah kedai itu dalam tempoh 24 bulan dari tarikh perjanjian itu, dan kegagalan berbuat demikian akan mengakibatkan ganti rugi yang dipersetujui mesti dibayar 'dari tarikh yang tersebut [iaitu tarikh perjanjian] hingga tarikh penyelesaian sebenar dan hantar-serah milikan kosong bangunan tersebut kepada pembeli'. Ini telah

menyimpang secara material daripada k 12(1)(o) Kaedah-Kaedah Pemaju Perumahan (Kawalan dan Pelesenan) 1970 ('Kaedah tersebut') yang memperuntukkan hantar-serah harus tidak lewat daripada 18 bulan dari tarikh menandatangani kontrak jualan itu. Kaedah 12(1)(r) memperuntukkan bayaran tanggung rugi bagi sebarang kelewatan dalam hantar-serah dikira dari sehari ke sehari 'mulai dengan segera selepas tarikh hantar-serah milikan kosong seperti yang ditetapkan dalam kontrak jualan'. Kerja ke atas projek itu telah berhenti pada 7 Mei 1982 atas arahan pihak berkuasa tempatan. Pada 1 Mac 1983, defendan telah dibenarkan meneruskan kerja tetapi tapak binaan didapati mengandungi granit keras menyebabkan blok-blok mustahil dapat dibina. Defendan telah mengatakan bahawa pelaksanaan perjanjian itu telah menjadi mustahil dan justeru itu ia telah gagal menghantar-serah dalam tempoh yang ditetapkan. Plaintif menuntut 'ganti rugi jumlah tertentu' menurut fasal 17 perjanjian itu. Penolong Kanan Pendaftar telah menolak permohonan plaintif di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 dan plaintif merayu kepada Mahkamah Tinggi. Defendan berhujah bahawa, walaupun milikan kosong telah tidak dihantar-serah selepas 15 tahun, kausa tindakan plaintif adalah pramasa memandangkan kes Majlis Privy *Loh Wai Lian v SEA Housing Corp Sdn Bhd* [1987] 2 MLJ 1. Justeru itu, isunya adalah sama ada kausa tindakan plaintif telah terakru.

Diputuskan, menolak rayuan dengan kos:

(1) Perjanjian itu dikuasai oleh Akta Pemaju Perumahan (Kawalan dan Pelesenan) 1966 ('Akta tersebut') dan Kaedah tersebut. Terma dan syarat yang bertujuan untuk mengelak daripada Akta dan Kaedah tersebut agar perlindungan kepada pembeli rumah disingkirkan tidak boleh dimasukkan. Justeru itu, nampaknya adalah jelas bahawa peruntukan hantar-serah milikan kosong dalam tempoh 24 bulan adalah terbatal (lihat ms 803C dan 804B–D).

(2) Kontrak itu haruslah ditafsirkan berdasarkan sebarang peruntukan berkanun yang dimaksudkan untuk memberi kesan kepada kontrak yang berkenaan. Kaedah 12 (1)(r) Kaedah tersebut mengenakan ke atas pemaju kewajipan untuk menanggung rugi pembeli bagi sebarang kelewatan dalam hantar-serah milikan, dan memperuntukkan satu rumusan menerusi mana amaun tanggung rugi akan dikira. Pengiraan amaun tanggung rugi adalah berdasarkan pengiraan kadar faedah dari sehari ke sehari mulai daripada tarikh penyelesaian kontraktual (lihat ms 804F).

(3) Walau bagaimanapun, k 12(1)(r) tidak boleh ditafsirkan sebagai menghalang ganti rugi untuk kelewatan akibat suatu ketidakmampuan untuk menghantar-serah sebuah rumah yang jelas dan dapat dipastikan (lihat ms 806C).

(4) Jika terdapat suatu ketidakmampuan yang jelas dan dapat dipastikan oleh defendan untuk menghantar-serah harta itu dalam masa yang tertentu, dan jika tarikh itu telah pun dipastikan dan maka ganti rugi dapat dikira, plaintif adalah berhak kepada ganti rugi itu (lihat ms 805F dan 806F).

(5) Dalam kes ini, pembinaan rumah kedai telah ditinggalkan dan selanjutnya, tarikh ketidakmampuan defendan untuk membina boleh dipastikan. Kemudian, adalah perlu untuk memastikan tarikh dari mana pampasan harus dibayar. Untuk tujuan itu, 18 bulan dari tarikh perjanjian itu ialah 9 Mac 1983, dan ia adalah titik permulaan. Walau bagaimanapun, kerja telah diarahkan berhenti pada 7 Mei 1982 dan dibenarkan untuk diteruskan pada 1 Mac 1983. Adalah boleh dipertikaikan sama ada tempoh permulaan 18 bulan diperuntukkan oleh k 12(1)(o) kepada defendan untuk menghantar-serah milikan kosong harus diselaraskan untuk mengambil kira tempoh pemberhentian kerja atas arahan pihak berkuasa tempatan. Persoalan itu tidak dapat dijawab dan rayuan ini akan ditolak dengan sewajarnya (lihat ms 807D–G).]

Notes

For cases on building contracts, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1245–1337.

Cases referred to

City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd [1988] 1 MLJ 69

Loh Wai Lian v SEA Housing Corp Sdn Bhd [1987] 2 MLJ 1

Mohammad bin Baee v Pembangunan Farlim Sdn Bhd [1988] 3 MLJ 211

SEA Housing Corp Sdn Bhd v Lee Poh Choo [1982] 2 MLJ 31

Legislation referred to

Housing Developers (Control and Licensing) Rules 1970 rr 12(1)(o), (r)

YL Yiew (CH Yeoh & Yiew) for the plaintiff.
Ahmad Marzuki (Shahinuddin & Ranjit) for the defendant.

Cur Adv Vult

KC Vohrah J: This is an appeal against the decision of the Senior Assistant Registrar ('the SAR') who dismissed the plaintiff's O 14 application.

The plaintiff's claim is for 'liquidated damages', as provided for in cl 17 of a sale and purchase agreement dated 9 September 1981 entered

into between the plaintiff and the defendant, on the defendant's failure to deliver a shop-house sold to the plaintiff within 24 months.

The plaintiff is, under r 12(1)(r) of the Housing Developers (Control and Licensing) Rules 1970, entitled to be indemified against delay in the delivery of the property. The defendant's contention is that, although vacant possession has not been delivered even after 15 years, the plaintiff's cause of action is premature in view of the decision in the Privy Council case of *Loh Wai Lian v SEA Housing Corp Sdn Bhd* [1987] 2 MLJ 1.

The issue, thus, before the SAR and in this appeal, is whether the plaintiff's cause of action has accrued in view of the decision in *Loh Wai Lian*.

That the agreement is governed by the Housing Developers (Control and Licensing) Act 1966 ('the Act') and the Housing Developers (Control & Licensing) Rules 1970 ('the Rules') is not in dispute.

Rule 12(1) of the Rules provides:

> Every contract of sale shall be in writing and shall contain within its terms and conditions provisions to the following effect, namely:
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> ...
>
> (o) provisions specifying the date of delivery of the vacant possession of the housing accommodation to the purchaser which date shall not be later than 18 months after the date of signing of the contract of sale;
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> ...
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> (r) provisions binding on the licensed housing developer that he shall indemnify the purchaser for any delay in the delivery of vacant possession of the housing accommodation. The amount of indemnity shall be calculated from day to day at the rate of not less than eight per centum per annum of the purchase price commencing immediately after the date of delivery of vacant possession as specified in the contract of sale;

Clause 17 of the agreement in the present case provides for the defendant '24 months to deliver vacant possession from the date of this agreement' and deviates materially from r 12(1)(o) which provides for delivery not later than 18 months from the date of signing of the contract of sale. Clause 17 substitutes for the words 'commencing immediately' as provided for by r 12(1)(r) with the words 'from such aforesaid date to the date of actual completion and delivery of possession of the said building ... to the purchaser', the 'aforesaid date' being a reference to the date of the signing of the agreement, apparently taking into account what was decided in *Loh Wai Lian*. In that case, Lord Oliver of Aylmerton held (at p 14), in respect of a clause also relating to the ascertainment of 'liquidated damages' on the failure of a defendant to deliver a building:

> The whole tenor of the clause is, in their Lordships' view, that the vendor is assuming as a matter of contract and subject to the occurrence of the condition precedent that the building remains uncompleted on the stipulated date, an express contractual obligation to pay a single sum which cannot

become due, because it cannot be ascertained, until the building has been completed and possession can be delivered.

Before going any further, I think it is necessary to note that as far as the deviation from the express provisions of the Rules is concerned, the then Federal Court, in *SEA Housing Corp Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31 noting that Parliament found it necessary to regulate the sale of houses and protect buyers by enacting the Act, ruled that only terms and conditions designed to comply with the requirements of the Rules may be inserted in a contract of sale and that terms and conditions which purport to get round the Act and Rules so as to remove the protection of home buyers may not be so inserted. The court declared that a clause which relieves the defendant from paying liquidated damages for delay caused by *force majeure* is void to the extent that it contravened the Rules and the Act.

On the basis of that decision, it does seem clear that the provision for delivery of vacant possession within 24 months is void. On the other hand, the contractual term that the damages are to be paid 'from such aforesaid date to the date of actual completion and delivery of possession of the said building to the purchaser' appears to incorporate the language that was in issue in the clause that was interpreted by the Privy Council in *Loh Wai Lian*. Although the plaintiff's claim is for 'liquidated damages' and cl 17 of the agreement mentions the recovery of 'agreed damages', in reality r 12(1)(r) is a provision for the plaintiff to be indemnified; and this becomes clear from what Lord Oliver had to say in *Loh Wai Lian* (at p 3) in interpreting a similar clause relating to recovery of damages in the light of r 12(1)(r) of the Rules:

> The starting point is that this contract is one the terms of which are regulated by statute and which therefore falls to be construed in the light of the statutory provisions to which it was designed to give effect. Rule 12(1)(r) imposed on the developer the obligation to indemnify the purchaser for any delay in delivery of possession and then went on to provide a formula by which 'the amount of indemnity' was to be calculated.

What is to be noted is the emphasis that is placed on the word 'indemnity' importing the notion of compensation for a loss already suffered, as Lord Oliver pointed out (in the same paragraph):

> *The use of the word 'indemnity' is significant, for in its natural meaning it imports the notion of compensation for a loss already suffered when the compensation is paid* (see, for instance, *Yorkshire Electricity Board v British Telecom* [1986] 2 All ER 961). The calculation of the amount of the indemnity was to be an entirely artificial one based on a day to day calculation of a rate of interest starting from the contractual completion date. This was to operate as the definitive ascertainment of the purchaser's right in respect of the delay which had occurred, but it did not, save in so far as a limitation is implicit in the use of the word 'indemnity', otherwise fetter or limit any right of damages for breach of contract. That rule, when incorporated into the actual contract between the parties, was modified in two ways. First, the 'indemnity' provided for by the rule was translated as 'agreed liquidated

damages.' Secondly, the formula for calculation of the indemnity was modified by specifying not only the *terminus a quo* as provided in the rule but also the *terminus ad quem*, that is to say, the date of actual completion and delivery of possession. It is, in their Lordships' view, tolerably clear that the only rational purpose of defining a payment to be made by the vendor, by reference to what has become a conventional term, as 'agreed liquidated damages' was to make it clear that the purchaser was not to have any right to any other payment by way of damages in respect of the delay over and above what the vendor was undertaking to pay, for there could not sensibly be any prospect of a sum calculated according to mandatory statutory provisions being held to be irrecoverable as a penalty. But the description of the amount as 'liquidated damages' cannot in any event be determinative of the date on which the sum is to be payable. The clause has to be reasonably and sensibly construed. The obligation is introduced by the words 'the vendor shall pay' and there follows the calculation of the sum which he is to pay carefully defined by its opening and closing date.

As I had stated earlier, the clause for the recovery of agreed damages is substantially similar to the clause that was interpreted in *Loh Wai Lian,* in that the *terminus a quo* was provided (although unlawfully) as 24 months from the date of signing of the contract of sale when it should be not later than 18 months, as also the *terminus ad quem*, the date of actual completion and delivery of possession. I am bound by the ruling in *Loh Wai Lian* on the interpretation of such a clause.

I am aware of the case of *City Investment Sdn Bhd v Koperasi Serbaguna Cuepacs Tanggungan Bhd* [1988] 1 MLJ 69, where the Privy Council appears to have departed from *Loh Wai Lian.* I, however, do not think there was a departure from that decision. As I see from the opinion of Lord Templeman in *City Investment Sdn Bhd,* the Privy Council found that there was a clearly ascertainable inability by the defendant in that case to deliver the property by a certain time. The Privy Council did not disturb the finding of the trial judge who had ascertained such a date; and therefore the damages could be calculated, and the plaintiff was entitled to the damages.

In *City Investment Sdn Bhd* at p 72, Lord Templeman had this to say in respect of damages for delay as a result of failure to build a house:

> Next, the appellants argued that if specific performance and damages are the appropriate remedies, the trial judge erred in the computation of damages. The trial judge awarded damages for the delay occasioned by the appellants' default. *The judge found that if the appellants had not committed breaches of contract, the terrace houses would have been completed by about 11 December 1979 and that by reason of the appellants' default there would be a further 18 months' delay incurred before a builder other than the appellants could have carried out the development.* The judge awarded interest for this 18 months at 8% per annum on the purchase price of the land and houses. Rule 12(1)(r) of the Rules of 1970 requires a contract by a licensed housing developer to include a provision that:

> '... he shall indemnify the purchaser for any delay in the delivery of the vacant possession of the housing accommodation. The amount of the indemnity shall be calculated from day to day at the rate of not less than 8% per annum of the purchase price commencing immediately after the date of delivery of vacant possession as specified in the contract of sale.'

The appellants argued that damages for delay under r 12(1)(r) would only be payable if a developer did not complete a house in time, and would not be payable where, as in the present case, the developer failed to build a house at all. On this construction, r 12(1)(r) would encourage a developer not to build instead of discouraging him from building slowly. There has been delay and the appellants must pay for that delay under the Rules just as they would have had to pay under common law rules.

Thus, r 12(l)(r) of the Rules cannot be construed as debarring damages for delay as a result of a clearly ascertainable inability to deliver a house. I had occasion to consider a similar issue in *Mohammad bin Baee v Pembangunan Farlim Sdn Bhd* [1988] 3 MLJ 211 in a written ruling (unreported). In that case, I had adjudged the sale and purchase agreement entered into between the plaintiff and the defendant to be caught within the Act and the Rules. The plaintiff had prayed for specific performance of the contract, but I refused the prayer and the matter was adjourned for argument as regards the damages to be awarded. In my ruling, after hearing arguments, I dealt with, inter alia, the question of whether the plaintiff was entitled to compensation for delay occasioned by the default in delivery of the house in terms of a clause in the agreement; similar to the clause under scrutiny here where the house could not be delivered for various reasons, and where I had determined from uncontroverted affidavit evidence that the house could be delivered on the day I gave judgment. I found that as of that date, there was a clearly ascertainable inability on the part of the defendant to deliver the house and gave judgment for compensation to be paid up to that date.

At p 6 of my ruling, I held in relation to r 12(1)(r) that the rule in the light of *City Investment Sdn Bhd* cannot be construed as debarring damages for delay as a result of failure to build a house and that '(it) seems clear too that cannot be construed as debarring damages for delay as a result of a clearly ascertainable inability to deliver a house.' In the ruling, this was also stated at p 6:

> In the instant case while the matter is not one of failure to build a house, the effect is the same — there is clear inability to deliver a contract house; the circumstances are such that there is no reasonable prospect at all of the house being delivered after an inordinate delay of eight years from the contractual date for the completion of the house. It cannot be that Parliament in enacting the Housing Developers (Control and Licensing) Act 1966 or that the rule-making authority in making the Rules of 1970 would countenance a housing developer abandoning a housing project for whatever reason after the developer has collected money from purchasers on a promise to deliver their houses on a contractual date without remedy for the delay in the delivery of the houses caused by the abandonment of the building project; the defendant has to pay for that delay under the Rules of 1970.

A The plaintiff therefore is entitled to compensation for the delay under r 12(1)(r) from the contractual date for delivery of possession up to the date I gave judgment for the plaintiff, the date when it was ascertained that the house cannot be delivered at all. This may be assessed by the Senior Assistant Registrar. This would be, on the basis of cl 15 of the sale and purchase agreement read with r 12(1)(r) of Rules of 1970, a sum calculated B from day to day at the rate of eight per centum per annum on the purchase price of RM21,590 of the property from 14 July 1980, the day after the contractual date of completion, up to 16 July 1988, the date I gave judgment in the case.

I have looked at the pleadings and the affidavits in this case. Amongst the C matters raised in the defence and the affidavits filed by the defendant is that on 7 May 1982, the defendant had stopped work in the housing project (where the plaintiff had contracted to buy the shop house on 9 September 1981) because the local authority, Dewan Bandaraya Kuala Lumpur, had on the same date ordered the defendant to stop work. The defendant apparently was allowed to resume work on 1 March 1983 but D 'performance of the agreement has been rendered impossible because the site for the construction has been found to contain hard granite which renders it impossible to build blocks therein' (see para 7(6) of defence). Two matters are pertinent. First, it seems clear that the construction has been abandoned on the admission of the defendant. Thus the date of the inability of the defendant to perform can be ascertained. Secondly, it will E be necessary to ascertain the date from which compensation should be paid. Eighteen months from the date of agreement (9 September 1981) would give 9 March 1983 as the starting point. But the local authority ordered the defendant to stop work on 7 May 1982, and allowed it to resume work on 1 March 1983. It is a matter of argument whether the F starting period of 18 months given under r 12(1)(o) to the defendant to deliver vacant possession has to be adjusted, to take into account the period of inactivity through stoppage of work because of a direction by the local authority.

That question cannot be decided in this appeal, and for this reason G I have to dismiss the appeal with costs.

Appeal dismissed.

Reported by Mariette Peters-Goh

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